

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TOM E. THERP**

Claimant

VS.

**QUALITY PROFILE SERVICES, INC.**

Respondent

AND

**ACCIDENT FUND INS. CO. OF AMERICA**

Insurance Carrier

Docket No. **1,034,654**

**ORDER**

Claimant requests review of the October 26, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) determined claimant suffered a discrete accidental injury on September 28, 2006, followed by a series of repetitive injuries as claimant continued working until April 18, 2007. Although the ALJ determined claimant had given timely notice of the discrete injury he further determined claimant failed to provide timely notice of the repetitive series of accidents and therefore denied benefits.

The claimant requests review of the following: (1) whether claimant sustained a single date of accident or a series of accidents; and (2) whether notice and written claim was timely filed for either the single or series of accidents.

Respondent argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant testified that he injured his right shoulder when he was pulling on a three foot wrench to open the front of a machine. He heard a popping and/or tearing sound in his shoulder but he continued to work. Claimant contacted his chiropractor, Dr. Sean Sorell, and was treated the very next day. He continued working and then, due to an increase in symptoms, sought treatment with Dr. Joel Hornung, his family physician. Dr. Hornung prescribed anti-inflammatory and muscle relaxant medication.

As claimant continued working he told his foreman and co-workers that he was having problems with his shoulder and they would help him perform some of the heavier work. As claimant kept working his shoulder kept getting worse.

Claimant saw Dr. Hornung again in February 2007 due to continued increase in his symptoms. Dr. Hornung ordered an MRI and then referred claimant to Dr. James McAtee. Claimant received a cortisone injection and also restrictions. Respondent was not able to accommodate claimant's restrictions. Claimant testified that the first time he mentioned to respondent that he had suffered a series of injuries was on July 25, 2007.

Dr. Kurt Knappenberger, in response to a letter inquiry from claimant's counsel, indicated by marking "yes" as his answer to a question whether he believed the injury claimant suffered to his shoulder on September 28, 2006, was aggravated as claimant continued working and therefore claimant suffered a series of accidents which culminated in his need for surgery.

Claimant has not worked since April 18, 2007, and shoulder surgery was performed by Dr. Knappenberger.

The ALJ concluded claimant failed to provide respondent timely notice of the series of accidents. The ALJ analyzed the evidence in the following manner:

The claimant did not give timely notice of any series, to include not giving notice within 75 days. The claimant argues that the respondent had actual notice. In doing so, the claimant charges the respondent with having a superior understanding of the claimant's medical condition than did the claimant. The claimant never reported to his treaters that his work was worsening his condition. He never asked his employer for treatment, or claimed that continuing to work was causing a worsening of his condition. Although the claimant's abilities did worsen over time, and to the extent that the claimant needed assistance to do his job, this was attributed only to the original accident. Even the claimant's own attorney did not see this as a series of accidents when the original application was filed in May 2007, the series was alleged only with the filing of an amended application in July.<sup>1</sup>

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<sup>1</sup> ALJ Order (Oct. 26, 2007) at 1.

This Board member agrees that claimant, as is the case with many unsophisticated workers, was unaware that he was suffering a series of injuries each and every day he continued working. But Dr. Knappenberger's uncontradicted opinion established that claimant suffered a series of injuries after the discrete injury which occurred on September 28, 2006. Moreover, Dr. Knappenberger further opined that the series of injuries further aggravated claimant's shoulder condition.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

(d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>2</sup> (Emphasis added.)

K.S.A. 2006 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that his condition was diagnosed as work related or the date he gave written notice of the injury to the employer.

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<sup>2</sup> K.S.A. 2005 Supp. 44-508(d).

There was no evidence claimant received written notification that his condition was diagnosed as work related before he provided written notice to the employer. But claimant did provide respondent written notice of his injury on approximately July 25, 2007, with the amended application for hearing. Consequently, under the plain language of the statute, his date of accident is July 25, 2007, and notice was timely for the series of microtraumas occurring through his last day worked.

This date of accident creates the result of having a date of accident after the last date claimant worked. A majority of Board members have concluded that such a result does not contradict the plain language of the statute. When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date after the last day worked or at a time when the injured worker was no longer employed leads to an unreasonable result.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>4</sup>

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<sup>3</sup> K.S.A. 44-534a.

<sup>4</sup> K.S.A. 2006 Supp. 44-555c(k).

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated October 26, 2007, is reversed and this matter remanded to the ALJ for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2007.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge